

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - CINCINNATI

STEVEN D. KING,)	
)	
Plaintiff,)	TRIAL BY JURY DEMANDED
)	
-vs-)	CASE NO.: C-1-01-802
)	
CSX TRANSPORTATION, INC.)	Judge Herman J. Weber
a corporation,)	
)	
Defendant.)	

MOTION TO CONTINUE TRIAL

NOW COMES the Plaintiff, Steven D. King, and hereby moves this Court to Continue the Trial in this matter and in support, thereof, states as follows:

1. This matter is presently scheduled for a jury trial beginning on December 1, 2003. A final pretrial conference is scheduled for November 19, 2003.
2. This lawsuit is brought pursuant to the Federal Employers Liability Act, 45 U.S.C. §51 *et seq.*, for injuries sustained by the plaintiff during the course of his employment with the defendant, CSX Transportation. Plaintiff has alleged that on or about March 12, 1999, he sustained a knee injury while attempting to board locomotive in Corbin, Kentucky.
3. Plaintiff remains an employee of the defendant, CSX Transportation, and retains seniority rights as a locomotive engineer. However, due to the injuries sustained in the above referenced incident plaintiff has not worked as a locomotive engineer for the defendant since January of 2000.
4. At the request of CSX Transportation, the plaintiff was examined by orthopedic

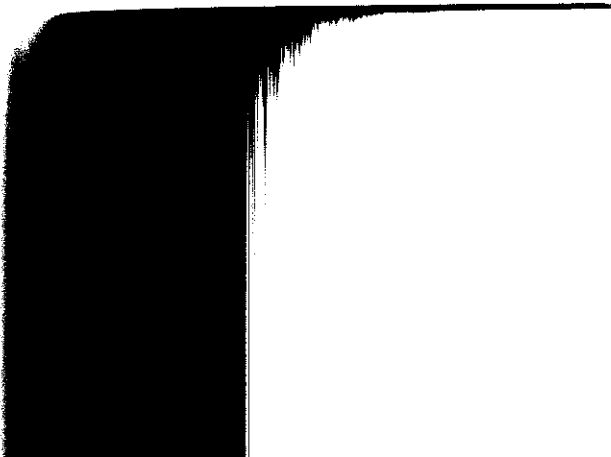
surgeon, Dr. Thomas Bender. At that time, Dr. Bender performed a physical examination of the plaintiff and also reviewed the medical records from plaintiff's treating physicians.

5. Dr. Bender has provided deposition testimony in this case. Dr. Bender testified that he has treated locomotive engineers such as the plaintiff in the past, has an understanding of their job duties, and that it is his expert medical opinion that the plaintiff is capable of performing the regular and routine tasks of a locomotive engineer for CSX Transportation. (Bender Evidence Deposition, p.25-26). Dr. Bender further testified that his opinion regarding the plaintiff's physical capability of returning to work is not at variance with the restrictions placed upon the plaintiff by the treating physician, Dr. Larkin. (Bender Evidence Deposition, p.26-27).

6. Plaintiff intends to attempt to return to work as a locomotive engineer for the defendant, CSX Transportation. On November 5, 2003 plaintiff had a follow up appointment with his treating physician, Dr. John Larkin, who has released him to return to work with no restrictions as of November 5, 2003. (See attached release from Dr. Larkin). Plaintiff will need to be re-certified as a locomotive engineer and also re-qualify to operate locomotives over his territory before he will be allowed to resume all of his regular duties as a locomotive engineer.

7. Plaintiff requests that the trial date of December 1, 2003 be stricken and that the trial in this matter be continued for a period of 90 days to allow plaintiff sufficient time to become re-certified, re-qualified and attempt to return to his position of locomotive engineer for the defendant, CSX Transportation.

8. The plaintiff's ability (or inability) to return to work for the defendant will be one of the primary issues at trial in this mater. Moreover, the plaintiff's economic losses will be



either reduced or increased depending upon whether he is capable of returning to his locomotive engineer position with the defendant.

9. This request for a continuation of the trial is made in the interests of justice and not for the purposes of harassment or undue delay.

10. It is expected that a resolution of the issues related to plaintiff's ability to return to work will simplify the issues to be determined at trial and facilitate a potential settlement of this matter.

11. Counsel for the defendant, James O'Connell, has been consulted with respect to this motion. However, as of the time of this filing Mr. O'Connell has been unable to contact his client to determine whether this motion will be opposed.

WHEREFORE, the plaintiff respectfully requests that the Court grant this motion and continue the trial in this matter for a period of approximately 90 days.

Respectfully submitted,

/s/ Robert E. Harrington, Jr.
Robert E. Harrington, Jr.
Patrick J. Harrington
Daniel W. Pisani
Attorneys for Plaintiff

Harrington, Thompson, Acker & Harrington, Ltd.
310 South Michigan Avenue--Suite 2000
Chicago, Illinois 60604
(312) 922-8833

CERTIFICATE OF SERVICE

I, Robert E. Harrington, Jr., hereby certify that on November 5, 2003 a copy of the foregoing **Motion to Continue Trial** was filed electronically. Notice of this filing will be sent to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Robert E. Harrington, Jr.
Harrington, Thompson, Acker & Harrington, Ltd.
310 South Michigan Avenue
Suite 2000
Chicago, Illinois 60604
(312) 922-8833



JOHN J. LARKIN, M.D.
G. AVERY KONDIK, P.A.-C.

320 Thomas More Parkway
Crestview Hills, KY 41017
(859) 426-4200
(859) 426-4206 fax

Patient: Steve King Employer: _____
Diagnosis: Patru Arthritis Left Next Visit: _____
Recommendations: None

WORK STATUS

☒ MAY RETURN TO WORK WITH NO RESTRICTIONS ON 11/5/03
☐ UNABLE TO WORK UNTIL _____
☐ CONTINUE CURRENT WORK RESTRICTIONS UNTIL _____
☐ MAY RETURN TO WORK ON _____ WITH THESE RESTRICTIONS:

Upper Extremity & Neck			No restrictions	None of this activity	Limited Restrictions	Lower Extremity & Back			No Restrictions	None of this activity	Limited Restrictions
<input type="checkbox"/> Left	<input type="checkbox"/> Right	<input type="checkbox"/> Both				<input type="checkbox"/> Left	<input type="checkbox"/> Right	<input type="checkbox"/> Both			
Driving					Hrs/day: 1-2 3-4 5-6 7-8	Standing					Hrs/day: 1-2 3-4 5-6 7-8
Reaching					Hrs/day: 1-2 3-4 5-6 7-8	Bending/Stooping/Crouching					Hrs/day: 1-2 3-4 5-6 7-8
Climbing Ladders/Scaffold					Hrs/day: 1-2 3-4 5-6 7-8	Climbing Ladders/Scaffold					Hrs/day: 1-2 3-4 5-6 7-8
Operating Heavy Eqmnt					Hrs/day: 1-2 3-4 5-6 7-8	Driving					Hrs/day: 1-2 3-4 5-6 7-8
Overhead Activity/Lifting					lbs times/day	Kneeling/Squatting/Crawling					Hrs/day: 1-2 3-4 5-6 7-8
Lifting to Waist Height					lbs times/day	Operating Heavy Eqmnt					Hrs/day: 1-2 3-4 5-6 7-8
Lifting/Pushing					Hrs/day: 1-2 3-4 5-6 7-8	Sitting/Sedentary					Hrs/day: 1-2 3-4 5-6 7-8
Lifting					5lb 10lb 15lb 25+lbs	Pull/Push/Carrying pounds					Hrs/day: 1-2 3-4 5-6 7-8
Continuous/Repetitive					Hrs/day: 1-2 3-4 5-6 7-8	Lifting, Floor to Waist					lbs times/day
Twisting/Sedentary					Hrs/day: 1-2 3-4 5-6 7-8	Twisting/Planting					
Other						Continuous/Repetitive					Hrs/day: 1-2 3-4 5-6 7-8
Other						Other:					

: If restrictions cannot be met, patient should be off work.

John J. Larkin, M.D. G. Avery Kondik, P.A.-C. Date _____

Page 2	Page 4
<p>1 --- 2 APPEARANCES 3 On behalf of Plaintiff: 4 PATRICK HARRINGTON, ESQ. 5 of 6 Harrington Thompson, Acker & 7 Harrington, Ltd. 8 310 S. Michigan Avenue 9 Suite 2000 10 Chicago, Illinois 60604 11 On behalf of Defendant: 12 JAMES O'CONNELL, ESQ. 13 of 14 Lindhorst & Dreidame 15 312 Walnut Street 16 Suite 2300 17 Cincinnati, Ohio 45202 18 19 ALSO PRESENT: Paul Jahn, videographer 20 21 22 23 24 25</p>	<p>1 INDEX 2 3 EXAMINATION BY: DIRECT CROSS REDIRECT RECROSS 4 MR. O'CONNELL 5 5 MR. HARRINGTON 28 6 7 8 9 10 11 12 13 14 15 EXHIBIT MARKED 16 17 18 NO EXHIBITS MARKED 19 20 21 22 23 24 25</p>
Page 3	Page 5
<p>1 STIPULATIONS 2 It is stipulated by counsel for the respective 3 parties that the deposition of THOMAS A. BENDER, 4 M.D., a witness herein, may be taken at this 5 time by the defendant as upon direct examination 6 and pursuant to the Ohio Rules of Civil 7 Procedure and notice to take deposition, all 8 other legal formalities being waived by 9 agreement; that the deposition may be taken in 10 stenotype by the Notary Public Reporter and 11 transcribed by her out of the presence of the 12 witness; that submission of the deposition to 13 the witness for examination and signature is 14 expressly waived. 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 MR. JAHN: We're on the record, 2 Doctor. 3 THOMAS BENDER, M.D., 4 a witness herein, of lawful age, having been 5 first duly sworn, as hereinafter certified, was 6 examined and testified as follows: 7 DIRECT EXAMINATION 8 BY MR. O'CONNELL: 9 Q. Let the record show that this is 10 the videotaped deposition of Dr. Thomas A. 11 Bender being taken by the defendant in this case 12 for presentation to the jury upon trial of this 13 case. 14 And let us begin, Doctor, by asking 15 you to state your name for the jury. 16 A. My name is Thomas Bender. 17 Q. What is your professional address? 18 A. My professional address is 3345 19 Whitfield Avenue, that's located in Cincinnati, 20 Ohio. 21 Q. And what is your profession? 22 A. I'm a Medical Doctor specializing 23 in orthopedic surgery. 24 Q. Are you authorized to practice 25 medicine in the State of Ohio?</p>

2 (Pages 2 to 5)

<p style="text-align: right;">Page 22</p> <p>1 incident?</p> <p>2 A. Not that I can say with certainty,</p> <p>3 although one is suspicious with the evolution of</p> <p>4 similar patella femoral problems on the right</p> <p>5 knee.</p> <p>6 Q. And what were the similar patella</p> <p>7 femoral problems on the right side?</p> <p>8 A. In the exam of 2003 he has early</p> <p>9 grading or popping under the right knee, which</p> <p>10 is more pronounced on the knee, left knee, which</p> <p>11 is claimed as a result of his employment.</p> <p>12 Q. And in your opinion where did the</p> <p>13 findings on the right knee originate from?</p> <p>14 A. I feel that's a degenerative</p> <p>15 condition.</p> <p>16 Q. And if he had degenerative changes</p> <p>17 occurring on the right knee in your opinion did</p> <p>18 he have similar changes going on on the left</p> <p>19 side?</p> <p>20 MR. HARRINGTON: There will be an</p> <p>21 objection.</p> <p>22 A. I don't think I can answer that</p> <p>23 question with certainty so we'll have to</p> <p>24 withdraw that.</p> <p>25 Q. What is Mr. King's present</p>	<p style="text-align: right;">Page 24</p> <p>1 patient did not have dysfunction or disability</p> <p>2 in the knee for which he wanted to repeat or</p> <p>3 engage treatment with a physician of record, Dr.</p> <p>4 Larkin, for the -- his knee injury. Dr.</p> <p>5 Larkin's function is what we call as the</p> <p>6 physician of record. He is the person whom you</p> <p>7 go back if you're having problems, and it's not</p> <p>8 evident that Mr. King went back to Dr. Larkin</p> <p>9 for a period of greater than 26 months.</p> <p>10 Q. Have you reviewed Dr. Larkin's</p> <p>11 physical exam findings from the patient's seeing</p> <p>12 him in June of 2003?</p> <p>13 A. Yes, sir, I have.</p> <p>14 Q. And how do his findings at that</p> <p>15 time compare with your findings from a short</p> <p>16 time earlier in the same month?</p> <p>17 A. We're within five degrees on range</p> <p>18 of motion testing. He had mild patella femoral</p> <p>19 crepitation on -- on the left knee exam, there</p> <p>20 was no focal tenderness on the patella femoral</p> <p>21 compression. Everything else about the knee is</p> <p>22 normal, and Dr. Larkin also noted the mild</p> <p>23 patella femoral crepitation on the right knee</p> <p>24 with exactly the same range of motion. So</p> <p>25 there's not a tremendous amount of dissimilarity</p>
<p style="text-align: right;">Page 23</p> <p>1 diagnosis and prognosis?</p> <p>2 A. The patient currently is</p> <p>3 symptomatic from -- from the patella femoral</p> <p>4 joint in the left knee. He has a good</p> <p>5 prognosis. He doesn't need additional surgery.</p> <p>6 This is something in which he should be</p> <p>7 encouraged to be active. He's had two minimally</p> <p>8 invasive surgeries to address this condition.</p> <p>9 Q. When you say minimally invasive</p> <p>10 surgeries what do you mean by that?</p> <p>11 A. Puncture wounds to look around the</p> <p>12 internal contents of the knee. If you look at</p> <p>13 the operative note or summaries not a tremendous</p> <p>14 amount of anatomical alteration was accomplished</p> <p>15 with either surgery.</p> <p>16 Q. All right. Doctor, please assume</p> <p>17 that Mr. King visited with his then attending</p> <p>18 orthopedist, Dr. Larkin, in May of 2001 but did</p> <p>19 not return to him with any knee complaints until</p> <p>20 June of 2003, a little over two years later.</p> <p>21 Is there any significance, in your</p> <p>22 opinion, in that the patient did not see his</p> <p>23 orthopedist for a period of about two years?</p> <p>24 MR. HARRINGTON: Objection.</p> <p>25 A. Yes, sir. It's evident that the</p>	<p style="text-align: right;">Page 25</p> <p>1 between the exam of the left knee and right knee</p> <p>2 by Dr. Larkin on this date of 6-16-03 --</p> <p>3 Q. All right.</p> <p>4 A. -- or whenever -- type 6-16-03.</p> <p>5 Q. Doctor, what restrictions, if any,</p> <p>6 would you place on Mr. King's current work</p> <p>7 activities?</p> <p>8 A. I think it's prudent for the man</p> <p>9 not to kneel, squat or crouch on a sustained or</p> <p>10 continuous basis. He may not be placed in a</p> <p>11 position where he would be going up and down</p> <p>12 ladders 15 or 20 feet or to an unprotected</p> <p>13 height. I think that he may have some</p> <p>14 difficulty with stair climbing on a repetitive</p> <p>15 basis but he could certainly do this several</p> <p>16 times a day.</p> <p>17 Q. Have you examined and/or treated</p> <p>18 locomotive engineers in the past?</p> <p>19 A. Yes, sir, I have.</p> <p>20 Q. And do you have an understanding of</p> <p>21 their duties?</p> <p>22 A. Yes, sir.</p> <p>23 Q. Have you looked at the photographs</p> <p>24 marked Defendant's Exhibits B 1 through B 10,</p> <p>25 the photographs of the locomotive which Mr. King</p>

7 (Pages 22 to 25)

<p style="text-align: right;">Page 26</p> <p>1 was involved with at the time of his accident?</p> <p>2 MR. HARRINGTON: Objection.</p> <p>3 A. Yes. Yes, sir, I have looked at</p> <p>4 the pictures.</p> <p>5 Q. In your opinion is Mr. King capable</p> <p>6 of performing the regular and routine tasks of a</p> <p>7 locomotive engineer?</p> <p>8 A. Yes, sir.</p> <p>9 Q. I'm going to ask you to assume that</p> <p>10 Dr. Larkin has testified that he would limit Mr.</p> <p>11 King in only these respects: no repetitive</p> <p>12 kneeling, squatting and climbing, and I'll also</p> <p>13 ask you to assume that Dr. Larkin did not define</p> <p>14 repetitive as to number of times a task would be</p> <p>15 performed.</p> <p>16 In your opinion does your</p> <p>17 assessment that you just gave us that Mr. King</p> <p>18 is capable of resuming his work as a locomotive</p> <p>19 engineer, in your opinion is your assessment at</p> <p>20 variance with the restrictions put on the</p> <p>21 patient by Dr. Larkin?</p> <p>22 MR. HARRINGTON: Objection.</p> <p>23 Assumes facts not in evidence.</p> <p>24 A. No, sir. I reviewed Dr. Larkin's</p> <p>25 deposition, I know Dr. Larkin wasn't very clear</p>	<p style="text-align: right;">Page 28</p> <p>1 other words, his functional capacity evaluation</p> <p>2 was done about six months after the surgery by</p> <p>3 Dr. Larkin. This FCE was available in June</p> <p>4 2001.</p> <p>5 Q. And how does that compare with your</p> <p>6 assessment of the patient in June of 2003?</p> <p>7 MR. HARRINGTON: Objection.</p> <p>8 A. This man's come a long way since --</p> <p>9 in the two years since he had that functional</p> <p>10 capacity evaluation. It's also evident that the</p> <p>11 patient did not go back to Dr. Larkin</p> <p>12 immediately after this functional capacity</p> <p>13 evaluation. He's not even sure who even</p> <p>14 assessed it or reviewed it. There's no record</p> <p>15 of any change or recommendations by Dr. Larkin</p> <p>16 in terms of medical record in terms of the</p> <p>17 results of this functional capacity evaluation.</p> <p>18 Q. Dr. Bender, in your opinion does</p> <p>19 Mr. King currently need ongoing medical</p> <p>20 attention?</p> <p>21 A. No, sir.</p> <p>22 Q. Thank you, Doctor. I believe</p> <p>23 that's all the questions I have.</p> <p>24 CROSS-EXAMINATION</p> <p>25 BY MR. HARRINGTON:</p>
<p style="text-align: right;">Page 27</p> <p>1 in terms of the frequency that he would allow</p> <p>2 the patient to get on and off the engine. Other</p> <p>3 than that I think my restrictions are comparable</p> <p>4 to those as offered by Dr. Larkin, and I will go</p> <p>5 further thinking this man can get off an engine</p> <p>6 several times a day.</p> <p>7 Q. And how about getting on an engine?</p> <p>8 A. Getting on and off an engine</p> <p>9 several times a day.</p> <p>10 Q. All right. Without waiving any</p> <p>11 objections that we might interpose to the</p> <p>12 functional capacity evaluation carried out at</p> <p>13 the direction of Dr. Larkin and to any</p> <p>14 evaluation of that by Dr. Best I want to ask you</p> <p>15 some questions about that functional capacity</p> <p>16 evaluation.</p> <p>17 First, have you had an opportunity</p> <p>18 to review that?</p> <p>19 A. Yes, I have.</p> <p>20 Q. Do you agree or disagree with the</p> <p>21 conclusions expressed in, in those reports?</p> <p>22 A. It's evident that the patient does</p> <p>23 have some continued deficits in left lower</p> <p>24 extremity and -- when he was seen six months</p> <p>25 after his second knee surgery by Dr. Larkin. In</p>	<p style="text-align: right;">Page 29</p> <p>1 Q. Doctor, my name's Patrick</p> <p>2 Harrington, one of the attorneys representing</p> <p>3 Mr. King. I have some questions for you today.</p> <p>4 Briefly, however, Mr. O'Connell, in</p> <p>5 his direct examination, asked you to state any</p> <p>6 opinions you would have in this case based upon</p> <p>7 a reasonable degree of medical certainty and I</p> <p>8 would ask that you afford me that same courtesy.</p> <p>9 All right, Doctor?</p> <p>10 A. Yes, sir.</p> <p>11 Q. I understand that of the</p> <p>12 approximate six times per year which you've</p> <p>13 provided medical legal evaluations for Mr.</p> <p>14 O'Connell or his firm each of those examinations</p> <p>15 were on the behalf of the defendant in the case;</p> <p>16 is that correct?</p> <p>17 A. Well, I've also evaluated people</p> <p>18 who were represented by their firm so I've given</p> <p>19 them opinions contrary to the members of the</p> <p>20 firms, as well.</p> <p>21 Q. Okay. And on an annual basis you</p> <p>22 perform approximately 300 medical legal</p> <p>23 examinations; is that correct?</p> <p>24 A. Yes, sir.</p> <p>25 Q. Vast majority of those are</p>

8 (Pages 26 to 29)

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION - CINCINNATI

STEVEN D. KING,)	
)	
Plaintiff,)	TRIAL BY JURY DEMANDED
)	
-vs-)	CASE NO.: C-1-01-802
)	
CSX TRANSPORTATION, INC.)	Judge Herman J. Weber
a corporation,)	
)	
Defendant.)	

ORDER

This cause coming to be heard on Plaintiff's Motion to Continue and the Court being sufficiently advised, it is hereby ordered:

The trial date of December 1, 2003 and final pretrial conference of November 19, 2003 are hereby stricken.

This Trial in the above styled cause is RESCHEDULED to the _____, 2004 trial term. Counsel shall file an amendment to their Joint Pretrial Order on or before _____, 2004.

IT IS SO ORDERED.

Herman J. Weber, Senior Judge
United States District Court